No. 15-7

IN THE

Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,
Petitioner,

v.

UNITED STATES AND COMMONWEALTH OF MASSACHUSETTS EX REL. JULIO ESCOBAR AND CARMEN CORREA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

JACKLYN N. DEMAR
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Suite 501
Washington, D.C. 20036

JENNIFER M. VERKAMP
Counsel of Record
CHANDRA NAPORA
MORGAN VERKAMP LLC
35 East 7th Street, Suite 600
Cincinnati, OH 45202
(513) 651-4400
jverkamp@morganverkamp.com

March 3, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. "Implied Certification" Reflects The Bedrock Principle That Government Contractors Who Seek Payment in Knowing Violation of Material Terms of Their Bargain Violate the FCA 4

A. The Plain Language of the Statute, Aligned with its History and Purpose, Supports the Basic Tenets of "Implied Certification" 4

B. A Natural Reading of "False or Fraudulent" Supports Application of the "Implied Certification" Theory 11

C. "Implied Certification" is Only a Label, Preserving Long-Standing FCA Principles 17

II. An "Express Condition" Requirement is Not Supported By the Statute 24

A. Materiality Provides the Necessary Nexus Between the Conduct and the Resulting Claim.....24

B. Petitioner Inappropriately Urges an Extra-Statutory Limitation to Curb Relator-Driven Cases 35

CONCLUSION 39

TABLE OF AUTHORITIES

CASES:

Ab-Tech Constr., Inc. v. *United States*, 31 Fed. Cl. 429 (1994) 18

Bates v. *United States*, 522 U.S. 23 (1997) 5

Chiarella v. *United States*, 445 U.S. 222 (1980) 14

Cook Cnty. v. *U.S. ex rel. Chandler*, 538 U.S. 119 (2003) 11

Fuller v. *De Paul University*, 293 Ill. App. 261 (Ill. App. Ct. 1938) 14

Graham Cnty. Soil & Water Conservation Dist. v. *Wilson*, 559 U.S. 280 (2010) 7

Hays v. *Meyers*, 139 Ky. 440 (Ky. 1908) 14

In re Cardiac Devices Litigation, 221 F.R.D. 318 (D. Conn. 2004) 26

In re Consumer Health Services of America, Inc., 171 B.R. 917 (Bkrtcy. D.D.C. 1994) 35

Maher v. *Hibernia Ins. Co.*, 67 N.Y. 283 (N.Y. 1876) 17

Mikes v. *Straus*, 274 F.3d 687 (2d Cir. 2001) 11, 24, 25

Minnesota Ass'n of Nurse Anesthetists v. *Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir. 2002) 28

Moskal v. *United States*, 498 U.S. 103 (1990) 10, 34

Murray & Sorenson v. *United States*, 207 F.2d 119 (1st Cir. 1953) 18

Neder v. *United States*, 527 U.S. 1 (1999) 16, 23, 25, 35, 38

New York v. *Amgen*, 652 F.3d 103 (1st Cir. 2011) ... 25

Omnicare, Inc. v. *Laborers Dist. Council Constr. Ind. Pens. Fund*, 135 S.Ct. 1318 (2015) 28, 29

Peterson v. *Weinberger*, 508 F.2d 45 (5th Cir. 1975) 6

Rex Trailer Co. v. *United States*, 350 U.S. 148 (1955) 32

Rock Island, A. & L. R. Co. v. *United States*, 254 U.S. 141 (1920) 35

SEC v. *Cochran*, 214 F.3d 1261 (10th Cir. 2000) 14

Shalala v. *Illinois Council on Long Term Care*, Inc., 529 U.S. 1 (2000) 35

Smith v. *United States*, 508 U.S. 223 (1993) 11

Stewart v. *Wyoming Cattle Ranche Co.*,
128 U.S. 383 (U.S. 1888) 14

U.S. ex rel. Badr v. *Triple Canopy, Inc.*, 775 F.3d 628
(4th Cir. 2015) 22, 27, 32

U.S. ex rel. Cieszyski v. *Lifewatch Servs., Inc., et al.*,
No. 13-cv-4052, 2015 U.S. Dist. LEXIS 141721
(N.D. Ill. Oct. 19, 2015) 21

U.S. ex rel. Conner v. *Salina Reg'l Health Ctr., Inc.*,
543 F.3d 1211 (10th Cir. 2008) 16, 20, 21, 26

U.S. ex rel. Durcholz v. *FKW Inc.*, 189 F.3d 542
(7th Cir. 1999) 34

U.S. ex rel. Hendow v. *Univ. of Phoenix*,
461 F.3d 1166 (9th Cir. 2006) 14, 24, 26

U.S. ex rel. Howard v. *KBR, Inc., et al.*,
No. 4:11-cv-04022, 2015 U.S. Dist. LEXIS
140258 (C.D. Ill. October 15, 2015) 21, 22

U.S. ex rel. Hutcheson v. *Blackstone Med., Inc.*,
647 F.3d 377 (1st Cir. 2011) 19, 22, 24, 25, 31

U.S. ex rel. Ketroser v. *Mayo Found., et al.*,
729 F.3d 825 (8th Cir. 2013) 19

U.S. ex rel. Kroening v. *Forest Pharmaceuticals, Inc., et al.*, No. 12-cv-366, 2016 U.S. Dist. LEXIS 3509 (E.D. Wis. Jan. 6, 2016) 21, 22

U.S. ex rel. Longhi v. *Lithium Power Techs. Inc.*, 575 F.3d 458 (5th Cir. 2009) 16

U.S. ex rel. Loughren v. *Unum Grp.*, 613 F.3d 300 (1st Cir. 2010) 16

U.S. ex rel. Marcus v. *Hess*, 317 U.S. 537 (1943) 6, 19, 29

U.S. ex rel. McLain v. KBR, Inc., No. 1:08-CV-499, 2014 U.S. Dist. LEXIS 92072 (E.D. Va. July 7, 2014) 29

U.S. ex rel. McNutt v. *Haleyville Medical Supplies, et al.*, 423 F.3d 1256 (11th Cir. 2005) 20, 31

U.S. ex rel. Oliver v. *Parsons Co.*, 195 F.3d 457 (9th Cir. 1999) 27

U.S. ex rel. Osheroff v. *Humana, Inc.*, 776 F.3d 805 (11th Cir. 2015) 19

U.S. ex rel. Pogue v. *Diabetes Treatment Ctrs. of Am., Inc.*, 565 F. Supp. 2d 153 (D.D.C. 2008) 30

U.S. ex rel. Prather v. *Brookdale Senior Living Communities, Inc.*, No. 3:12-CV-00764, 2015 U.S. Dist. LEXIS 150468 (M.D. Tenn. Nov. 5, 2015) 29

U.S. ex rel. Purcell v. *MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015) 31

U.S. ex rel. Sanders v. *North American Bus Indus.*, 546 F.3d 288 (4th Cir. 2008) 16

U.S. ex rel. Schell v. *Battle Creek Health Sys.*, 419 F.3d 535 (6th Cir. 2005) 35

U.S. ex rel. Steury v. *Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010) 19, 21

U.S. ex rel. Steury v. *Cardinal Health, Inc.*, 735 F.3d 202 (5th Cir. 2013) 12, 21

U.S. ex rel. Watson v. *King-Vassel*, 728 F.3d 707 (7th Cir. 2013) 28

U.S. ex rel. Wilkins v. *United Health Grp., Inc.*, No. 10-2747, 2011 U.S. App. LEXIS 13322 (3d Cir. June 30, 2011) 26, 31, 35

U.S. ex rel. Willard v. *Humana Health Plan of Tex., Inc.*, 336 F.3d 375 (5th Cir. 2003) 19

United States v. *Acme Process Equipment Co.*, 385 U.S. 138 (1966) 33

United States v. *Aerodex*, 469 F.2d 1003 (5th Cir. 1972) 32

United States v. *Beach*,
71 F. 160 (D. Colo. 1895) 17

United States v. *Bornstein*,
423 U.S. 303 (1976) 6

United States v. *Bourseau*,
531 F.3d 1159 (9th Cir. 2008) 16

United States v. *Brown*,
333 U.S. 18 (1948) 11

United States v. *Cooperative Grain & Supply Co.*,
476 F.2d 47 (8th Cir. 1973) 15

United States v. *DeWitt*, 265 F.2d 393
(5th Cir. 1959) 18, 19

United States v. *General Dynamics Corp.*,
19 F.3d 770 (2d Cir. 1994) 33

United States v. *Grainger*,
346 U.S. 235 (1953) 17

United States v. *Griswold*,
24 F. 361 (D. Or. 1885) 15

United States v. *Hibbs*,
F.2d 347 (3rd Cir. 1977) 17

United States v. *Kurlemann*,
708 F.3d 722 (6th Cir. 2013) 12

United States v. *Menasche*,
348 U.S. 528 (1955) 5

United States v. *Nat'l Whol.*,
236 F.2d 944 (9th Cir. 1956) 6, 32

United States v. *Neifert-White Co.*,
390 U.S. 228 (1968) 8

United States. v. *Rogan*, 517 F.3d 449
(7th Cir. 2008) 6, 20, 22, 31, 33

United States v. *Sanford-Brown, Ltd.*,
788 F.3d 696 (7th Cir. 2015) 20

United States v. *Sci. Applications Int'l Corp.*,
626 F.3d 1257 (D.C. Cir. 2010) 6, 24, 25, 31, 32

United States v. *Wells*, 519 U.S. 482
(U.S. 1997) 15

STATUTES:

31 U.S.C.
§ 3729(a)(1)(A) 5
§ 3729(a)(1)(A)-(G) 5
§ 3729(a)(1)(B) 5
§ 3729(a)(1)(G) 5
§ 3729(b)(4) 15,16

42 U.S.C. § 1320a-7b(g) 30

REGULATIONS AND GUIDANCE:

59 Fed. Reg. 65372 (December 19, 1994) 31
68 Fed. Reg. 23731 (May 5, 2003) 30

LEGISLATIVE MATERIALS:

132 Cong. Rec. H6482
(daily ed. Sept. 9, 1986) 6, 36

145 Cong. Rec. E1546
(daily ed. July 14, 1999) 36

155 Cong. Rec. E1295
(daily ed. June 3, 2009) 7,9,10, 32

Cong. Globe, 37th Cong.,
3d Sess. 952 (1863) 6, 32

S. Rep. Com. No. 75, 37th Cong.,
3d Sess. (1863) 6

S. Rep. No. 345, 99th Cong.,
2d Sess. (1986) 7, 8, 9, 15, 33, 35, 36, 38

OTHER MATERIALS:

Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* (2d ed. 2010)
§ 4:26 12
§ 4:33 17

Government Accountability Office Report to Congressional Requesters, *Health Care Fraud: Information on Most Common Schemes and the Likely Effect of Smart Cards* (January 2016) 38

Restatement (Second) of Torts (1977)
§ 529 ..... 12,13, 23
§ 538 16,25
§ 551(1) 13
§ 551(2)(b)-(e) 13,14

The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Com. On the Judiciary 110th Cong. 167-85 (2008) 36

U.S. Dep't of Justice, *Fraud Statistics Overview: October 1, 1987 – September 30, 2015* 37

U.S. Dep't of Justice, Press Release, *Justice Department Recovers over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* 37

INTEREST OF AMICUS CURIAE[1]

Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief as *amicus curiae*.

TAFEF is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. TAFEF has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has provided testimony before Congress regarding each of the proposed amendments to the FCA since 1986, and has participated in litigation both as a *qui tam* relator and as *amicus curiae* regarding the proper interpretation of the FCA. TAFEF presents an annual educational conference for FCA attorneys, typically attended by more than 300 private and government attorneys from across the country. TAFEF's members regularly bring FCA actions on behalf of private citizens and the United States to protect public resources through public-private partnership.

---

[1] No party's counsel authored this brief in whole or in part, and no persons or entities other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

"Implied certification" is a label, representing one method by which courts have analyzed liability under the FCA. In reaction to protracted use of the phrase "false certification," courts have used "implied certification" to impose liability for false or fraudulent claims based on underlying conduct rather than express false statements. However, a judicial construct is unnecessary to accomplish this. A natural reading of the text of the statute, in consonance with its purpose and history, firmly supports liability for underlying fraudulent conduct which results in claims upon the public fisc.

To wit, implied certification simply reflects the basic principle that a contractor violates the FCA when it submits a claim while knowingly concealing facts material to payment. Such concealment has long been considered fraud, both at common law and by this Court. This is squarely in step with the intent of the FCA's drafters. Each time it has amended the Act since 1986, Congress' intent has resounded in unequivocal terms. It was amended to modernize the law, to comprehensively protect the fisc, and to hold contractors responsible for all false or fraudulent conduct involving public funds.

Consistent with these principles, courts have long held contractors liable under the FCA for knowing violations of conditions which are material to payment.

And yet petitioner asserts that it cannot be held to answer under the FCA either because it did not make an express statement that its services were provided in compliance with mental health regulations at issue, or because, in petitioner's view, the regulations at issue did not contain the right talismanic words to qualify as "conditions of payment." Petitioner's arguments require this Court to rewrite the statute, and it promotes an approach that creates a counterintuitive gap between conduct that violates an express condition precedent and conduct that the defendant knows to be material to payment. There is no "express words" requirement in the FCA. Rather, liability is bounded by materiality and knowledge, the mechanisms chosen by Congress to prevent the parade of horribles petitioner fears.

The underlying decision demonstrates that these delimiting principles are well-handled by the courts. The regulations at issue did not require the court to create a material condition out of whole cloth. Rather, the regulations make plain that claims are not reimbursable without compliance. Resp. Br. 8-9. Far from being the sort of outlier which supports the argument that the FCA is a renegade law requiring the intervention of a judicial posse to protect a contractor tied to the tracks of a litigation train, this case squares precisely with the language of the statute and the intent of Congress, and rests firmly within a century's jurisprudence supporting use of the FCA to recover for false claims and fraud against the public fisc.

The decision below should be affirmed.

ARGUMENT

I. "Implied Certification" Reflects The Bedrock Principle That Government Contractors Who Seek Payment in Knowing Violation of Material Terms of Their Bargain Violate the FCA.

Petitioner challenges an approach to analyzing liability under the FCA that has been characterized over time as "implied certification." This approach, at bottom, merely reflects the long-established proposition that the FCA is violated when a contractor requests payment from the United States while knowingly concealing facts material to payment. This proposition underpins the archetypical cases decided under the statute, is faithful to the statutory text, and is consistent with the scope and purpose of the FCA.

A. The Plain Language of the Statute, Aligned with its History and Purpose, Supports the Basic Tenets of "Implied Certification".

That FCA liability may attach without an express false statement on the claim form is unremarkable. Words like "certification" and "condition of payment" were adopted by courts as aids to explaining liability, but such constructs are no longer helpful when the focus shifts to examining the elements of the construct rather than the statute itself.

1. The Text. As relevant here, the FCA imposes liability on any person who "knowingly presents, or

causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). The FCA contains six additional provisions for liability, yet not one of these provisions contains the word "certification" nor does any require an express false statement on the face of the claim for payment. 31 U.S.C. 3729(a)(1)(A)-(G). Only two provisions include as an element a "false record or statement." 31 U.S.C. 3729(a)(1)(B) (liability for one who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim"); 3729(a)(1)(G) (addressing "an obligation to pay or transmit money or property to the Government...").

Subsection 3729(a)(1)(A)'s palpable lack of a false statement requirement, in contrast to the other statutory provisions, is critical here. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (internal quotations omitted). Engrafting a false statement or certification requirement into subsection (a)(1)(A) would effectively conflate it with subsection (a)(1)(B), counter to the "cardinal principle" of construction that courts must strive to give effect to all parts of a statute. *United States* v. *Menasche*, 348 U.S.528, 538-39 (1955).

Far from being limited to a falsehood apparent on the face of a claim, or to any other express false statement (such as a false certification), subsection

(a)(1)(A) imposes liability for all "false or fraudulent" claims for payment submitted or caused to be submitted to the United States, irrespective of express false statements or certifications. More than a century's FCA jurisprudence, including seminal cases from this Court, show that the false or fraudulent conduct of defendants is not limited to falsehoods on the face of the claim for payment. *E.g.*, *United States* v. *Bornstein*, 423 U.S. 303 (1976) (subcontractor violation of standard for procuring radio tubes incorporated in prime contract); *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) (subcontractor collusive bidding to obtain contract).[2] As the Seventh Circuit described in *United States* v. *Rogan*, the standard could hardly require the claim form to affirmatively state "patient acquired by kickback." 517 F.3d 449, 453 (2008).

2. History and Purpose. This proposition flows naturally from the FCA's purpose. Congress enacted the FCA in 1863 to attack war profiteering. Cong. Globe, 37th Cong., 3d Sess. 952 (1863). Contractors were not just overcharging and mis-billing, but engaging in and concealing fraud. *Id.* at 955 (sawdust masqueraded as gunpowder); 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (same mules being sold repeatedly); S. Rep. Com. No. 75, 37th Cong., 3d Sess. 4 (1863) (decrying scheme of

---

[2] *United States* v. *Nat'l Whol.*, 236 F.2d 944 (9th Cir. 1956) (regulators disguised as model specified in contract); *Peterson* v. *Weinberger*, 508 F.2d 45 (5th Cir. 1975) (disqualified healthcare provider submitted claims under different provider number); *United States* v. *Sci. Applications Int'l Corp. (SAIC)*, 626 F.3d 1257 (D.C. Cir. 2010) (services provided in violation of conflict-of-interest provisions of contract).

providing rotting, old ships painted and sold as new as inconsistent "with that alacrity and faithfulness in the discharge of duty which the government has a right to expect from those to whom important trusts are confided").

After amendments in 1943 caused the statute to lie dormant (largely due to the amendments' curtailing of relators' roles), Congress found that "fraud against the Government had grown to unprecedented levels." 155 Cong. Rec. E1295-96 (daily ed. June 3, 2009) (statement of Rep. Berman); S. Rep. No. 345, 99th Cong., 2d Sess. 1-2 (1986). In response, it amended the FCA in 1986 "to strengthen the Government's hand in fighting false claims, and to encourage more private enforcement suits." *Graham Cnty. Soil & Water Conservation District* v. *Wilson*, 559 U.S. 280, 298 (2010)(internal citations omitted).

Petitioner and its supporters call for a narrowing of the FCA to respond to a supposed disconnect between modern law and a "Civil War-era" statute. *E.g.*, Chamber of Commerce Amicus Br. 15. These protests ignore the *raison d'etre* of the 1986 Amendments: the "growing pervasiveness of fraud [which] necessitates modernization of the Government's primary litigative tool for combatting fraud [, the FCA.]" S. Rep. No. 345 at 2. In overhauling the statute to make it "a more useful tool against fraud in modern times" – indeed, fraud that was becoming even more "sophisticated and widespread" – Congress significantly bolstered the provisions to incentivize relators while maintaining

the statute's proscription against "false or fraudulent" claims. *Id.* at 2.

In so doing, Congress specifically delineated the reach of the FCA, alerting government contractors that the FCA "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S. Rep. No. 345 at 9. Indeed, the Senate Committee "strongly endorse[d]" this Court's "interpretation of the act" when it concluded that the FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." S. Rep. No. 345 at 19, quoting *United States* v. *Neifert-White*, 390 U.S. 228 (1968).

The legislative history illustrates the breadth of liability with specific examples. "[A] false claim may take many forms, the most common being a claim for goods or services not provided, or *provided in violation of contract terms, specification, statute, or regulation*." S. Rep. No. 345 at 9 (emphasis added). In addition:

> ...claims may be false even though the services are provided as claimed *if, for example, the claimant is ineligible to participate in the program...*
>
> ...each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, *or in*

> *violation of any statute or applicable regulation*, constitutes a false claim.
>
> [also] false and actionable under the act... are all Medicare claims submitted by or on behalf of a physician *who is ineligible to participate in the program*.

Id. at 9-10 (emphasis added).

Congress' intent was firmly reiterated in the 2009 amendments. Representative Berman, a co-sponsor for both the 1986 and 2009 amendments, stated on the House floor that the amendments were designed to strengthen the provisions of the FCA, by "updat[ing] this law to ensure that it reaches the modern fraud schemes that are draining our public fisc with impunity." 155 Cong. Rec. at E1295. In response to its view that a ruling by this Court regarding subsection (a)(1)(B) had limited the reach of the FCA in a manner inconsistent with what Congress had intended, Congress "clarify[ied] the true intent of the False Claims Act and to send a clear message that all government funds should be protected from fraud." *Id.* at E1295-1296.

Recognizing that Congress "cannot possibly predict the breadth of fraudulent schemes that can be used to target the public fisc," Representative Berman made clear that the FCA proscribes fraudulent conduct which is not apparent on the face of the claim, including:

> Seeking payment pursuant to a program for which the claimant was *not eligible*.

> Demanding payment for goods or services that *do not conform to contractual or regulatory requirements.*
>
> Requesting Government services to which *one is not entitled.*
>
> Submitting a claim by a person who has *violated a statute or regulation, the violation of which is capable of influencing the payment decision.*
>
> Submitting a claim for payment even though the defendant was *violating the Government funded program's conditions of participation or payment.*

Id. at 1296-1297 (emphasis added; additional examples omitted).

Congress' intent has been loud and clear each time it has chosen to "modernize" the FCA: The FCA was never intended to allow corner-cutting contractors to hide under its skirts with robotic and narrow language. Rather, Congress intended to entrench the FCA as "the protector of all Government funds or property." *Id.* at E1296. Moreover, while "[t]his Court has never required that every permissible application of a statute be expressly referred to in its legislative history," *Moskal* v. *United States*, 498 U.S. 103, 111 (1990), Congress has specifically and repeatedly recognized that claims premised on violations of underlying

statutes and regulations are within the scope of the FCA.

This explicit purpose evidence cannot be read out of the statute. The Court looks to the statutory language and "every thing from which aid can be derived" in order to ascertain the scope and meaning of the statute. *Smith* v. *United States*, 508 U.S. 223, 239 (1993). A statute is not given the "narrowest meaning;" rather, "words are given their fair meaning in accord with the manifest intent of the lawmakers." *United States* v. *Brown*, 333 U.S. 18, 26 (1948).

Thus, though petitioner claims that "implied certification" is beyond the statute, the basic premise underlying the theory—that a claim may be rendered false or fraudulent by underlying conduct—comports with the statute's plain text, its purpose, and history.

B. A Natural Reading of "False or Fraudulent" Supports Application of the "Implied Certification" Theory.

The common understanding of the phrase "false or fraudulent" encompasses a broad band of conduct. As this Court has repeatedly observed, "Congress wrote expansively" to reach all types of fraud. *Cook Cnty.* v. *U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003).

"'False' can mean 'not true,' 'deceitful,' or 'tending to mislead.'" *Mikes* v. *Strauss*, 274 F.3d 687, 696 (2d Cir. 2001). Fraud, however, "has long been understood to include a broader range of deceptive

conduct." *United States* v. *Kurlemann*, 708 F.3d 722, 728 (6th Cir. 2013) (interpreting 18 U.S.C. 1014). While courts have merged the concept of "false" and "fraudulent" over time,[3] these twin precepts of the statute, which have existed since its passage in 1863, have distinct meanings key to understanding its breadth.

The traditional, commonsense understanding of fraud, like the theory of implied certification, encompasses omissions of material facts. While petitioner concedes that material omissions are within the common law conception, it insists that actionable omissions must be preceded by an express duty to disclose statutory, regulatory, or contract violations when seeking payment. Pet. Br. 30-31. This myopic view narrows not only the concept of fraud, but also Congress' meaning of the phrase "false or fraudulent."

1. The Common Law. Fraudulent misrepresentation includes "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter..." Restatement (Second) of Torts § 529 (1977) (Restatement). The nature of this tort is that the person "knows or believes that the undisclosed facts might affect the

---

[3] See Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 4:26 (2d ed. 2010) ("Courts do not always distinguish between 'false' claims and 'fraudulent' claims, and often simply refer to 'falsity' or, as the statute's title does, 'false claims.'"); *U.S. ex rel. Steury* v. *Cardinal Health, Inc.*, 735 F.3d 202, 209 (5th Cir. 2013) (*Steury II*) (Higginson, J., concurrence).

recipient's conduct in the transaction at hand." *Id.* at Comment (b).[4]

Petitioner points instead to a different section of the Restatement in which liability for nondisclosure is limited to matters regarding which a person "is under a duty to the other to exercise reasonable care to disclose...." Restatement § 551(1); Pet. Br. 31. Petitioner argues that such a duty arises only to those parties which are in "a fiduciary or other similar relation of trust" with the Government. *Id.* Even were this so, government contractors are indeed in that "similar relation of trust" with the Government. See Resp. Br. 30. But that is far from the only way in which the duty to disclose arises. A more thorough citation to the Restatement reveals that a duty to exercise reasonable care of disclosure under the common law also includes scenarios where disclosure prevents misleading representations; to correct previous representations; or to disclose basic facts about which one would reasonably expect disclosure. Restatement § 551(2)(b)-(e).

While this section of the Restatement is meant to reflect "the traditional ethics of bargaining between adversaries," it acknowledges that this "privilege to take advantage of ignorance" is a very limited principle. *Id.* at Comment (k), (l). As the Restatement and the case law recognize, many factors give rise to a reasonable expectation of disclosure, including an obligation of good faith and

---

[4] A typical example would include the nondisclosure of a latent defect in the sale of land or chattel. *Id.* at Comment C.

fair dealing;[5] where the recipient is not in an equal position to obtain information or where "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair;"[6] or where parties have entered into a contractual agreement.[7]

Each of these applies to the government contractor, who is not only a party to a transaction with the Government, but in a position of superior knowledge regarding its compliance or lack thereof with legal or contractual requirements. Using this section of the Restatement to instead preserve a "privilege" for government contractors to "take advantage of ignorance" would run counter to the remedial nature of the statute. Both this Court and Congress have recognized that the FCA "is intended to protect the Treasury against the hungry and

---

[5] *Id.* at Comment (l).

[6] *Chiarella* v. *United States*, 445 U.S. 222, 248 (1980) (Blackmun, J., dissenting) (citations omitted); *Fuller* v. *De Paul University*, 293 Ill. App. 261, 267 (Ill. App. Ct. 1938)(silence regarding applicant's apostasy was deceptive and material); *Hays* v. *Meyers*, 139 Ky. 440, 444 (Ky. 1908)(collecting cases and noting that the "nature of the subject matter of the contract" or the peculiar circumstances of the case may "impose a legal or equitable duty to disclose material facts").

[7] *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (U.S. 1888)("[t]he gist...is fraudulently producing a concealment or suppression of material facts not equally within the knowledge or reach of the [other contracting party]"); *SEC* v. *Cochran*, 214 F.3d 1261, 1265 (10th Cir. 2000)(common law duty to disclose arose "anytime the facts and circumstances surrounding a relationship would allow a reasonably prudent person to repose confidence in another person").

unscrupulous host that encompasses it on every side, and should be construed accordingly." *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885); S. Rep. No. 345 at 11.

This view of false or fraudulent works hand in glove with the FCA's knowledge standard, which specifically requires no intent to deceive. 31 U.S.C. 3729(b)(4).[8] Rather, it was fashioned to impose a duty on contractors to make an inquiry of "the true and accurate basis" of their claims to the Government. S. Rep. No. 345 at 20. Contractors receiving public funds must be "reasonably certain they are *entitled* to the money they seek." *Id.* (emphasis added). Indeed, "[t]he applicant for public funds has a duty to read the regulations or be otherwise informed of the basic requirements of eligibility." *United States* v. *Cooperative Grain*, 476 F.2d 47, 55 (8th Cir. 1973).

While petitioner argues that such case law seeks to apply "special duties of disclosure," Pet. Br. 31, this ignores that the duty to disclose facts material to the eligibility of the claim for payment flows from the statute itself. Moreover, it mistakes the basic common law precepts of Restatement Sections 529 and 551, which provide that a party to a transaction is not at liberty to seek payment in full while hiding material violations of the terms of their agreement.

---

[8] While the common law can be used to assess the natural reading of the statute, this maxim does not engraft all the elements of a common law crime onto the statute. *United States* v. *Wells*, 519 U.S. 482, 491 (U.S. 1997). Here, the drafters specifically removed intent to deceive.

2. Application of a Materiality Standard to Fraud Statutes. This reading of false or fraudulent is also in consonance with this Court's application of a materiality standard to fraud statutes: Fraud statutes incorporate materiality because the "well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." *Neder* v. *United States*, 527 U.S. 1, 22 (1999). Following *Neder*, the majority of courts of appeal have read a materiality element into subsection (a)(1)(A). *E.g.*, *U.S. ex rel. Loughren* v. *Unum Group*, 613 F.3d 300 (1st Cir. 2010); *U.S. ex rel. Longhi* v. *Lithium Power Techs., Inc.*, 575 F.3d 458 (5th Cir. 2009), *cert denied*, 130 S. Ct. 2092 (2010); *U.S. ex rel. Sanders* v. *North American Bus Indus.*, 546 F.3d 288 (4th Cir. 2008); *United States* v. *Bourseau*, 531 F.3d 1159 (9th Cir. 2008).

As *Neder* identified, a matter is material if a "reasonable man" would find its existence or nonexistence important to his decision-making or "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." 527 U.S. at 22, quoting Restatement § 538. The common-law definition of materiality as what is likely to affect the decision of the recipient is now integrated into subsection (a)(1)(B) of the FCA. 31 U.S.C. 3729(b)(4) ("material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property).

The use of the phrase "false or fraudulent" to include concealments of facts which would have affected the Government's decision to pay is fully in line with the broad understanding of fraud at the time of the FCA's drafting. *E.g.*, *Maher* v. *Hibernia Ins. Co.*, 67 N.Y. 283, 292 (N.Y. 1876) (fraud includes "any trick or artifice by one, to induce another to fall into, or remain in an error, to his harm"); *United States* v. *Beach*, 71 F. 160 (D. Colo. 1895)("[f]raud may be only an artifice to deprive another of his right, without gain to the person practicing it"); Resp. Br. 29.

C. "Implied Certification" is Only a Label, Preserving Long-Standing FCA Principles.

1. Evolution of Certification. False certification first appeared in *United States* v. *Hibbs*, which construed an older version of the statute proscribing using a false "certificate" to obtain approval of a claim. 568 F.2d 347, 349 (3d Cir. 1977).[9] False certification generally refers to scenarios where the defendant has falsely certified compliance with an underlying term or condition, thereby rendering the resulting claim false. See Sylvia, *supra* n. 5 at § 4:33. An affirmative false certification renders a claim false, because in such cases the affirmative statement of compliance is untrue.

Over the years, however, "false certification" has acquired a life of its own apart from the statute. When a claim is based on underlying conduct, rather

---

[9] Cf. *United States* v. *Grainger*, 346 U.S. 235 (1953).

than a facial falsity, "false certification" has been the fast track to discerning a nexus between the conduct and the resulting claim that renders it "false or fraudulent." Instead of remaining just one means by which a claim can be false, certification became one of the primary lenses through which "false or fraudulent" claims were evaluated.

Courts quickly found that restricting FCA liability to cases of facially false descriptions of goods or services or affirmative false certifications of compliance created giant loopholes for false or fraudulent conduct. The need to carve room out of prolific and rigid use of the construct of "false certification" led to a new label: implied certification.

In lieu of an *affirmative* false certification, the theory evolved to include claims that were presented as if entitled to payment, but without any express statement of compliance. Rather, the claims "represented an implied certification...of [defendant's] continuing adherence to the requirements for participation in the ... program." *Ab-Tech Constr., Inc.* v. *United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994).

The theory that seeking payment reflects an implied representation that one is entitled to it was not new, as such conduct had long been recognized as encompassed by the FCA. *E.g.*, *United States* v. *DeWitt*, 265 F.2d 393, 397 (5th Cir. 1959) (implied representation of entitlement to funds from Veteran's Administration despite knowing violation of statutory mandate restricting loan to home occupied by veteran); *Murray & Sorenson* v. *United*

States, 207 F.2d 119, 124 (1st Cir. 1953) (implied representation that bids were at a figure defendant would have submitted in competition); *Hess*, 317 F.2d at 544 (same). The label is simply another expression of the basic principle that "[i]f the government defines its bargain in a manner that requires adherence to a statute or regulation, compliance with that statute or regulation is implied by virtue of a request for payment." *U.S. ex rel. Willard* v. *Humana Health Plan*, 336 F.3d 375, 382 (5th Cir. 2003).

The majority of circuits have adopted this method of establishing liability under the FCA. See Resp. Br. 26, n. 12, collecting cases from Second, Third, Fourth, Sixth, Ninth, Tenth, and D.C. Circuits; cf. *U.S. ex rel. Hutcheson* v. *Blackstone Med., Inc.*, 647 F.3d 377, 385-88, 392-94 (1st Cir. 2011) (specifically declining to use the term "implied certification," but recognizing that a claim may be false or fraudulent even if the claim form contains no explicit false statement), cert. denied, 132 S. Ct. 815 (2011).

The Fifth, Eighth and Eleventh Circuits have reserved judgment on "implied certification," but each has recognized that the FCA imposes liability where there is no express false statement, but the claim is otherwise materially false or fraudulent. *U.S. ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010)(*Steury I*); *DeWitt*, 265 F.2d. 393; *U.S. ex rel. Ketroser* v. *Mayo Found., et al.*, 729 F.3d 825 (8th Cir. 2013) (assessing whether claims for Medicare payment were materially false by evaluating whether regulations represented a condition of payment); *U.S. ex rel. Osheroff* v.

Humana, Inc., 776 F.3d 805, 808 n.1 (11th Cir. 2015) (reserving judgment); *U.S. ex rel. McNutt* v. *Haleyville Medical Supplies, et al.*, 423 F.3d 1256, 1259 (11th Cir. 2005) (FCA liability when claims submitted knowing of ineligibility for payments demanded due to violations of conditions of payment).

The Seventh Circuit recently "declined to join" the other circuits in adopting implied certification. *United States* v. *Sanford-Brown, Ltd.*, 788 F.3d 696, 711, n.7 (7th Cir. 2015), *petition for cert. pending*, No. 15-729 (U.S. filed Dec. 2, 2015) (citations omitted). *Sanford-Brown* was not a healthcare case, instead involving Title IV funding provided a for-profit college pursuant to a Program Participation Agreement (PPA) signed with the Department of Education. The court found that the PPA was a condition of participation entered into in good faith, and rejected the proposition that, absent bad faith entry of the initial agreement, later violations of Title IV restrictions could create FCA liability. *Id.* at 712.

It is unclear that *Sanford-Brown* is a categorical rejection of the tenets of implied certification. If it is, it is the only court of appeals to so hold. This interpretation would be contrary to the Seventh Circuit's prior decision in *Rogan*, in which the court upheld false claims resulting from violations of the Stark and Anti-Kickback laws. 517 F.3d at 453. Moreover, the Seventh Circuit premised its holding on joining the Fifth Circuit in *Steury I*, which

actually "did not reject the implied certification theory of FCA liability." *Steury II*, 735 F.3d at 205.[10]

Since *Sanford-Brown*, a number of district courts in the Seventh Circuit have concluded that it is limited to its facts, which involved "regulatory violations that had no demonstrable nexus to a payment decision." *U.S. ex rel. Howard* v. *KBR, Inc., et al.*, No. 4:11-cv-04022, 2015 U.S. Dist. LEXIS 140258 *80 (C.D. Ill. October 15, 2015); *U.S. ex rel. Cieszyski* v. *Lifewatch Servs., Inc.*, No. 13-cv-4052, 2015 U.S. Dist. LEXIS 141721 *30 (N.D. Ill. Oct. 19, 2015); *U.S. ex rel. Kroening* v. *Forest Pharmaceuticals, Inc., et al*, No. 12-cv-366, 2016 U.S. Dist. LEXIS 3509 *13-4 (E.D. Wis. Jan. 6, 2016).

2. The Rejection of "Implied Certification" Principles Would Narrow the Plain Text of the FCA. Each of the post-*Sanford-Brown* decisions cited above involves facts which fit squarely within the meaning of "false or fraudulent" but which would have fallen into a loophole created by a rejection of implied certification. *Howard* involved payment sought by KBR for unallowable costs of more than $600 million of excessive inventory, which it hid from the Government and omitted from underlying reports. 2015 U.S. Dist. LEXIS 140258. *Cieszyski* involved Medicare payment sought for the monitoring of cardiac devices by uncertified technicians in India, which the provider hid by substituting the names of certified technicians in the underlying records. 2015

---

[10] Rather, *Steury I* recognized that other facts may support FCA liability for knowing violations of conditions of payment. 625 F.3d at 270.

U.S. Dist. LEXIS 141721 *10-11. *Kroening* involved a nationwide scheme to pay lavish kickbacks to doctors to induce them to prescribe drugs, notwithstanding that compliance with the Anti-Kickback Statute is "a fundamental prerequisite to reimbursement." 2016 U.S. Dist. LEXIS 3509 *15, 22.

Avoiding the need to rely on constructs, each of these district courts returned to the language of the FCA. Quoting *Rogan*, 459 F. Supp. 2d at 717-18, the *Howard* court found that even without an express certification of compliance, KBR's knowing submission of claims to the Government for payment when it violated "a statute or regulation that contains, on its face, a direct nexus to the [G]overnment's payment decision is...actionable under the FCA." *Howard* at *84.

In dealing with the practical application of the statute to a variety of fact patterns, these courts follow recent courts of appeal that have observed that "rigid use of such labels" sometimes gets in the way of what was intended by the statute. *U.S. ex rel. Badr* v. *Triple Canopy, Inc.*, 775 F.3d 628, 635, n.3 (4th Cir. 2015) ("Our focus, regardless of the label used, remains on whether the Government has alleged a false or fraudulent claim"). In *Hutcheson*, the First Circuit explained:

> Courts have created these categories in an effort to clarify how different behaviors can give rise to a false or fraudulent claim. Judicially-created categories sometimes can help carry out a

> statute's requirements, but they can also create artificial barriers that obscure and distort those requirements. The text of the FCA does not refer to "factually false" or "legally false" claims, nor does it refer to "express certification" or "implied certification." Indeed, it does not refer to "certification" at all. In light of this, and our view that these categories may do more to obscure than clarify the issues before us, we do not employ them here.

647 F.3d at 385-86; cf. *SAIC*, 626 F.3d at 1268.

The First, Fourth, and D.C. Circuits properly recognize that extra-statutory limitations cannot be used to foreclose liability for false or fraudulent conduct captured within the text and purpose of the FCA. The rejection of "implied certification" as an artificial label is warranted; but the rejection of its basic premise—that underlying conduct can render a claim false or fraudulent—would rewrite the statute Congress enacted.

Implied certification is nothing more than the recognition that seeking payment pursuant to a contract or statutory or regulatory program makes a representation that one is entitled to that payment. As *Neder*[11] and Restatement § 529 recognize, concealment of a fact material to the claimant's entitlement to payment is fraudulent. Whether called implied certification or anything else, the knowing submission of claims in violation of material

---

[11] 527 U.S. at 22.

conditions of the claimant's eligibility for payment is patently within the statute.

II. An "Express Condition" Requirement is Not Supported By the Statute.

A. Materiality Provides the Necessary Nexus Between the Conduct and the Resulting Claim.

1. Evaluating the Nexus to Payment. Concerned with how to cabin liability in cases where the underlying program terms are tangential or irrelevant to payment, the Second Circuit has suggested that the availability of "implied certification" is limited to those cases where the underlying contract, statute, or regulation expressly states that compliance is a prerequisite to payment. *Mikes*, 274 F.3d at 700.

Several courts of appeal have rejected the *Mikes* limitation suggested by petitioner, finding that this type of talismanic, magic-word requirement would foreclose liability in situations that Congress intended to fall within the Act's scope and would "create artificial barriers" that obscure the FCA's requirements. *Hutcheson*, 647 F.3d at 385-88; *SAIC*, 626 F.3d at 1270; see also *U.S. ex rel. Hendow* v. *University of Phoenix*, 461 F. 3d 1166, 1176 (9th Cir. 2006). As the D.C. Circuit observed, "nothing in the statute's language specifically requires such a rule." *SAIC*, 626 F.3d at 1268 -1270.

The materiality analysis provides the correct dividing line between those requirements that are so

integral to the program that a violation is capable of influencing the payment decision, *id.*, and those where "noncompliance would not have influenced the government's decision to pay the claim" or were "tangential." *Mikes*, 274 F.3d at 697.

The use of a materiality standard is true to the natural reading of the statute, its history, and the policy it implements. The use of the word fraudulent incorporates a materiality requirement, based on the well-settled meaning of fraud as a "concealment of material fact." *Neder*, 527 U.S. at 22. Consistent with the Restatement § 538, material concealment would include those facts that a reasonable payer (here, the Government) would "attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Id.*

Petitioner's bid to limit liability to express wording in a statute or regulation would render the *Neder* materiality analysis superfluous, and instead replace it with a heightened standard. The court's assessment of whether conduct was material to payment is a "fact-intensive and context-specific inquiry," *New York* v. *Amgen*, 652 F.3d 103, 110-11 (1st Cir. 2011). "Express contractual language may 'constitute dispositive evidence of materiality,' but materiality may be established in other ways, 'such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue.'" *Hutcheson*, 647 F.3d at 394, quoting *SAIC*, 626 F.3d at 1269.

A rigid rubric swallows this rule. For example, in the healthcare context, some courts have used the phrases "condition of payment" and "condition of participation" to distinguish between mere technical requirements and those capable of influencing the Government's decision to pay. *E.g.*, *U.S. ex rel. Wilkins* v. *United Health Grp., Inc.*, 659 F.3d 295, 306 (3d Cir. 2011). Yet it is clear that government healthcare regulators have long used the term "condition of participation" without regard to how it has been distinguished in FCA case law. As the Ninth and Tenth Circuits have recognized, "some regulations or statutes may be so integral to the Government's payment decision as to make any divide between conditions of participation and conditions of payment a 'distinction without a difference.'" *U.S. ex rel. Conner* v. *Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1222 (10th Cir. 2008), quoting *Hendow*, 461 F.3d at 1177.

Moreover, in petitioner's construct, courts could not look to agency manual provisions, for example, to determine whether such provisions make it plain that the requirement at issue was integral to payment. Such a result would be absurd, as "manual provisions are the official explanation of the Medicare statute and regulations by the Secretary," which providers are required to follow. *In re Cardiac Devices Litigation*, 221 F.R.D. 318, 343 (D. Conn. 2004). The materiality analysis correctly permits a court to look to all appropriate sources to determine whether the representation was material.

2. Materiality and Knowledge Are the Proper Delimiting Principles. Petitioner and its supporters

argue that looking beyond "express words" fails to provide defendants fair notice because without a stricter standard, contractors will not be able to objectively ascertain which conditions are material to payment. Pet. Br. 44; Am. Hosp. Ass'n Amicus Br. 14. Rather, they argue, good faith contractors with honest intentions may be liable for the smallest of technical violations. *Id.*

These "sky will fall" arguments are "ungrounded in reality." *U.S. ex rel. Oliver* v. *Parsons Co.*, 195 F.3d 457, 460 (9th Cir. 1999). First, it is well-established that a "contractor relying on a good faith interpretation of a regulation is not subject to liability," because scienter will be foreclosed. *Id.* at 464. Under the knowledge standard, a contractor will not be liable for a contemporaneously held facially reasonable interpretation of an ambiguous term. *Id.*

Second, by its definition, materiality ensures that "not every part of a contract can be assumed, as a matter of law, to provide a condition of payment." *Triple Canopy*, 775 F.3d at 637, n.5. Because materiality requires facts that establish that the conduct was capable of affecting the payment decision, it precludes liability for the "mere technical" violations that petitioner fears will bring corporations to their financial knees.

The mechanism provided by the FCA's drafters has already led courts to create the delimiting principles called for by petitioner. There is no liability under the FCA for negligence, nor for

innocent mistakes.[12] There is no liability for violation of a provision which is objectively ambiguous, nor for which there is no extrinsic evidence of materiality.[13] In short, there is no liability where there is no reasoned basis to conclude that a defendant had knowledge or recklessly disregarded that its conduct was capable of influencing the decision of a reasonable payor.

Petitioner wholly ignores these bounding principles, instead arguing that materiality relies on after-the-fact speculation. *E.g.*, Pet. Br. 23. Materiality, however, is an objective standard, not unique to the FCA. See, *e.g.*, *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Ind. Pens. Fund*, 135 S.Ct. 1318, 1327 (2015) ("Whether a statement is misleading depends on the perspective of a reasonable investor: The inquiry (like the one into materiality) is objective"). No decision cited by petitioner advocates a materiality analysis that would invite a court to create a material condition out of whole cloth.

Courts regularly and routinely grapple with such issues, and the case law demonstrates that they are well-capable of it. Though petitioner and its supporters argue vehemently that materiality and scienter are not decided on a motion to dismiss, the facts show otherwise. TAFEF conducted a survey of

---

[12] *U.S. ex rel. Watson v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013).

[13] *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002).

FCA cases decided from April 2013 to present, where materiality or knowledge was at issue. Of 104 district court cases reviewed, the Government intervened in approximately 15%. Of the declined cases, courts dismissed over half.[14]

More importantly, these policy arguments do not change that Congress chose the current bounding principles of the existing statute, and that Congress chose the litigation process – through both intervened and declined cases – to ensure that FCA reached all manner of fraud against the public fisc. As this Court recognized in *Hess*, while considering challenges to the role of a relator:

> The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. ... But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.

317 U.S. at 546-547; see also *Omnicare*, 135 S.Ct. at 1331(policy arguments are for Congress).

---

[14] *E.g.*, *U.S. ex rel. Prather* v. *Brookdale Senior Living Communities, Inc.*, No. 3:12-CV-00764, 2015 U.S. Dist. LEXIS 150468 (M.D. Tenn. Nov. 5, 2015) (no materiality where documentation occurred late but prior to final billing); *U.S. ex rel. McLain* v. *KBR, Inc.*, No. 1:08-CV-499, 2014 U.S. Dist. LEXIS 92072 (E.D. Va. July 7, 2014). See also collected cases at Resp. Br. 51 n.29.

3. Counterintuitive Gap Created by Extra-Statutory Limitations. If a court's evaluation of "false or fraudulent" is limited to talismanic words in a contract, statute, or regulation, it would create a significant gap in the types of cases Congress intended to be covered. For example, if a regulator specifically warned contractors that it viewed compliance with a statutory provision integral to payment, but the statute in question did not expressly designate the requirement a "condition of payment," a contractor's specific disregard of that warning would be outside the FCA under the construct advanced by petitioner.

Indeed, this was the exact scenario for FCA cases premised on violations of the Anti-Kickback Statute ("AKS"). Since 1972, a felony statute has prohibited the payment of kickbacks to physicians, but it did not expressly designate violations of its provisions as false claims until 2010. 42 U.S.C. 1320a-7b(g). Prior to 2010, the agency charged with implementing the statute consistently targeted kickbacks as a significant source of fraud on the programs and warned all "manufacturers, providers, and suppliers of health care products...and services" that their AKS violations brought with them not just criminal liability, but potential exclusion from participation in the system, and FCA liability. 68 Fed. Reg. 23731, 23734 & 23737 (May 5, 2003). In addition, the provider agreement was amended in 2001 to include a specific attestation that payment was conditioned on compliance with the AKS. *U.S. ex rel. Pogue* v. *DTCA*, 565 F. Supp.2d 153, 159 (D.D.C. 2008).

Although every court of appeals to address the question has concluded that compliance with the AKS is a material condition of payment,[15] petitioner's express-words rubric would have precluded liability prior to 2010.[16] Under petitioner's proposed construct where materiality is demonstrated only by specific words in a contract, statute or regulation, the court would have been precluded from examining the kickback prohibitions throughout the manuals, agency guidance, and even the Special Fraud Alerts issued on the topic. See, *e.g.*, Special Fraud Alert, Joint Venture Arrangements, *reprinted in* 59 Fed. Reg. 65372 (December 19, 1994). Courts would be in the perverse position of ignoring that defendants had been warned that their conduct was considered fraudulent. *U.S. ex rel. Purcell* v. *MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015) (contractors cannot ignore guidance which would have warned them away from the conduct).

As described by *SAIC*, this rigid rubric promoted by petitioner creates a "counterintuitive gap" between conduct that violates an express condition precedent and conduct that the defendant knows to be material to payment. 626 F.3d at 1269. A contractor would be free to submit claims for

---

[15] *E.g.*, *Wilkins*, 659 F.3d at 313; *Rogan*, 517 F.3d at 452; *McNutt*, 423 F.3d at 1259.

[16] This would have precluded a case like *Hutcheson*, which involved a nationwide scheme of offering cash, sham medical directorships, and other lavish incentives to induce doctors to perform spine surgeries on Medicare beneficiaries using defendant's products. *Hutcheson*, 647 F.3d at 380.

payments while concealing its knowledge of facts material to the payment decision. *Id.*

Petitioner tries to account for this gap by arguing that the statute's legislative history makes room for liability when there has been a delivery of worthless goods. Pet. Br. 38. Under this theory, a claim is considered false because it is as if the contractor provided no goods or services at all. *Id.* This proposition again fails to account for the language and purpose of the statute, and reads out of the statute liability for fraudulent claims.

FCA jurisprudence is replete with examples of liability for substandard goods, where the goods or services delivered were worth *less* rather than zero.[17] The amount of harm goes to damages (which is not an element of FCA liability), not to whether there is a fraud. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152-53 (1955).

4. Petitioner's Construct Impermissibly Shifts the Burden to the Government. Petitioner argues that the Government's "calibrated [administrative] mechanisms" should be a vehicle for addressing the gap between express-word violations and violations

---

[17] *E.g.*, Cong. Globe, 37th Cong., 3d Sess. 955 (liability for substandard goods provided in Civil War); 155 Cong. Rec. E1296 (FCA liability for "goods or services that are defective or of lesser quality than those for which the Government contracted"); *United States* v. *Aerodex*, 469 F.2d 1003, 1007 (5th Cir. 1972); *Nat'l Whol.*, 236 F.2d at 950 (provision of falsely branded regulators); *Triple Canopy*, 775 F.3d at 636-637 (provision of armed security guards who failed to satisfy marksmanship requirements).

material to payment. Pet. Br. 42. This runs directly counter to the statute's purpose, which is to supplement the out-manned resources of the Government by incentivizing relators to step forward and help "protect the Treasury against the...unscrupulous host." S. Rep. No. 345 at 11. By arguing that the Government's mechanisms should catch the fraud, it "shift[s] the burden" to catch the fraud on the Government, "which is directly at odds with the stated goal of the FCA." *U.S. ex rel. Schell* v. *Battle Creek Health Sys.*, 419 F.3d 535, 541 (6th Cir. 2005).

As the Seventh Circuit rightly described in *Rogan*, "[t]he question is not remotely whether [defendant] was sure to be caught—though it would have been, had it disclosed the truth on all 1,812 reimbursement requests—but whether the omission could have influenced the agency's decision...[The] laws against fraud protect the gullible and careless...." 517 F.3d at 452. This inquiry highlights the fallacy in petitioner's argument that administrative mechanisms suffice to address a contractor's conduct. Such a result is not only dependent on the agency having the resources to do so, but on the agency *knowing* about it, notwithstanding that the schemes at issue involve *concealment* of material fact.[18]

---

[18] Moreover, the fact that the Government has multiple mechanisms available to it to redress defendants' conduct does not preempt the FCA. *E.g.*, *United States* v. *General Dynamics Corp.*, 19 F.3d 770, 774 (2d Cir. 1994); *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138 (1966).

Expecting an agency to predict the breadth of all fraudulent schemes and then re-regulate every program across the nation to add express "condition-of-payment" language to every pertinent provision would not only shift a significant financial and administrative burden to the Government but also would require it to pre-define every potential fraudulent attempt to impact the fisc. This is simply not what was contemplated by the statute, nor is it required by this Court. *Moskal*, 498 U.S. at 108.

Rather, the FCA contemplates that the contractor will abide by the terms of its bargain and seek only those payments for which it is eligible. Indeed, if a contractor has violated a technical, administratively-correctable term of its contract, it is reasonable to expect the contractor to inform the Government.[19] As the Third Circuit observed:

> participants making claims to the Government under the federal health care programs have to ensure that they are not violating the federal health care laws which they agreed to follow when they entered into contracts with CMS...We do not think this is an unreasonable requirement to impose on federal health care contractors, for as Justice Holmes once wrote: "Men must turn square corners when they deal with the Government."

---

[19] Evidence of an agency's knowledge is routinely utilized by a defendant to rebut that its conduct was knowing. *U.S. ex rel. Durcholz* v. *FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999).

Wilkins, 659 F.3d at 314 quoting *Rock Island, A. & L. R. Co.* v. *United States*, 254 U.S. 141, 143 (1920).[20]

Materiality correctly balances the natural reading of "false or fraudulent" with the statutory purpose. Far from allowing the unbounded parade of horribles described by petitioner and its supporters, a materiality analysis properly effectuates this Court's edict that anti-fraud statutes proscribe concealment of material facts. *Neder* at 22.

B. Petitioner Inappropriately Urges an Extra-Statutory Limitation to Curb Relator-Driven Cases.

Ignoring the proscriptions of the 1986 drafters, petitioner and its supporters put relators' heads on the "chopping block" as the basis for circumscribing liability.[21] They strive to convince this Court that implied certification cases are the byproduct not of corporate fraud but of greedy relators and their

---

[20] And certainly, a healthcare contractor is no different than any other. The provider agreement "together with the overall scheme under the [healthcare] statute and regulations" create the terms of its contractual obligations. *In re Consumer Health Services of America, Inc.*, 171 B.R. 917, 920 (Bkrtcy. D.D.C. 1994); see also *Shalala* v. *Illinois Council on Long Term Care, Inc., 529* U.S. 1, 9 (2000). Thus, the proposition that healthcare contractors will submit claims for services covered and payable under the relevant program terms and conditions is not a modern complexity; it is a basic understanding of the healthcare system.

[21] S. Rep. No. 345 at 28, quoting whistleblower testimony as justification for amendment.

attorneys. This mischaracterization flies in the face of Congress' intent and disregards the long-proven importance of relators and their counsel to the Government's fight against fraud.

The FCA clearly expresses the value Congress places on relator-driven cases, and it has repeatedly reinforced the necessity of the public/private partnership of the FCA. *E.g.*, 132 Cong. Rec. S15036 (daily ed. Oct. 3, 1986) (statement of Sen. Grassley)("Primary in the original 'Lincoln Law' as well as this legislation is the concept of private citizen assistance in guarding taxpayer dollars."); 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (statement of Rep. Berman) (with the 1986 amendments, "Congress wanted to encourage those with knowledge of fraud to come forward...[and] we wanted relators and their counsel to contribute additional resources to the government's battle against fraud").

As Congress recognized, relators and their counsel do not enter into FCA litigation lightly. *E.g.*, S. Rep. No. 345 at 28 (acknowledging the "risks and sacrifices of the private relator"). In fact, the decision to file a *qui tam* case very often involves great personal risks to career, income, savings, family, friendship, and in some cases, even personal safety.[22]

---

[22] *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Com. on the Judiciary*, 110th Cong. 167-85 (2008) (statement of Tina M. Gonter, Relator), *available at* https://www.judiciary.senate.gov/download/testimony-of-tina-m-gonter-pdf.

The personal risks taken by whistleblowers to bring more cases are beneficial to the United States. Since the *qui tam* provisions of the FCA were strengthened in 1986, the number of relator-initiated suits rose from 30 in 1987 to 638 in 2015.[23] That growth in *qui tam* suits has led to increased recoveries for the public fisc. From 2009-2015, the Government recovered $19.4 billion via *qui tam* suits, just over 73% of the total $26.4 billion recovered. Notably, in the fraud statistics published by the Department of Justice, declined cases have resulted in the recovery of over two billion dollars for the United States.[24]

This dwarfs in comparison to the mammoth growth in amounts of fraud across all government programs. In 1986, only $54 million was recovered under the FCA; in 2015, that figure increased to $3.5 billion.[25] Healthcare fraud represented more than half of that recovery.[26] In January 2016, the Government Accountability Office reported that a review of healthcare fraud cases from 2010 reflected

---

[23] U.S. Dep't of Justice, *Fraud Statistics Overview: October 1, 1987 – September 30, 2015* (Nov. 23, 2015), *available at* http://www.justice.gov/opa/file/796866/download.

[24] *Id.*

[25] 155 Cong. Rec. E1295, 1297-98 (statement of Rep. Berman); U.S. Dep't of Justice, Press Release, *Justice Department Recovers over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

[26] *Id.*

about "68 percent of the cases included more than one scheme with 61 percent including two to four schemes and 7 percent including five or more schemes."[27] The "sophisticated and widespread" fraud that Congress sought to redress in 1986, S. Rep. No. 345 at 4, only continues to grow and become more widespread.

Arguments that declined cases are stretching the statute and that "implied certification" may engender meritless suits about remote technical violations are unfounded and belied by the facts of this case. Here, the underlying administrative report noted more than a dozen "technical" violations, including petitioner's lack of requisite fire drills, failure to close patient doors to protect privacy, and failure to properly house records. 2JA1-20. Yet, this litigation focused not on these violations, but on regulations at the essence of the substandard medical services provided to a Medicaid beneficiary – the unsupervised provision of medical care provided by unqualified individuals.

Far from supporting extra-statutory limitations on the application of the False Claims Act, the rising level of fraud reinforces that liability should be construed consistent with "the ultimate touchstone," the FCA's purpose.[28] The FCA was designed to

---

[27] Report to Congressional Requesters, *Health Care Fraud: Information on the Most Common Schemes and the Likely Effect of Smart Cards* (Jan. 2016), *available at* http://www.gao.gov/assets/680/674771.pdf.

[28] *Neder*, 519 U.S. at 511 (Stevens, J., dissenting) (citation omitted).

protect the public fisc. Petitioner is not a 14 year old teenager mowing the grass in a manner that flagrantly violates the requests of his mother. Petitioner is a government healthcare contractor, who should be held to the material terms of its agreement with the United States, consistent with the statute, its history, and the seminal decisions of this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JACKLYN N. DEMAR
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-4826
jdemar@taf.org

Counsel for *TAFEF*

JENNIFER M. VERKAMP
Counsel of Record
CHANDRA NAPORA
MORGAN VERKAMP LLC
35 East 7th Street, Ste. 60(
Cincinnati, OH 45202
(513) 651-4400
jverkamp@morganverkam

Counsel for *Amicus Curiae*

March 3, 2016